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No. 87-2027

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF COLORADO ex rel. Colorado
Attorney General Duane Woodard,
Petitioner,

v.

WESTERN PAVING CONSTRUCTION CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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SUPPLEMENTAL BRIEF FOR RESPONDENT IN OPPOSITION

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Pursuant to S. Ct. R. 22.6, respondent, Western Paving Construction Company, submits this brief response to petitioner's supplemental filing of September 21, 1988 on the basis of the Fifth Circuit's recent decision in *Texas v. Allan Construction Co.*, 1988-2 Trade Cas. (CCH) ¶ 68,183, 1988 U.S. App. LEXIS 11244 (5th Cir. 1988).

1. Contrary to petitioner's arguments, the *Allan* opinion fully supports and confirms the correctness of the Tenth Circuit's decision affirming the district court's judgment in this case. Consistent with the decisions of the district court and court of appeals below, the court in *Allan* confirmed the prevailing judicial view that proof

of affirmative acts of concealment is necessary to toll the antitrust statute of limitations under the fraudulent concealment tolling doctrine. *See* Pet. App. at 4919.[1] As this prevailing view was the basis for the decisions below, the *Allan* opinion further demonstrates that additional review of this case is not warranted.

2. Petitioner further errs in contending that the *Allan* opinion conflicts with the Second Circuit's decision in *New York v. Hendrickson Brothers, Inc.*, 840 F.2d 1065 (2d Cir. 1988), *petitions for cert. filed*, 57 U.S.L.W. 3061 and 3062 (U.S. July 2 and 8, 1988) (Nos. 88-21 and 43). Consistent with the *Allan* opinion and every other federal court of appeals that has addressed the issue, the court in *Hendrickson* relied on a showing of affirmative acts of concealment to reach its conclusion that the antitrust limitations period had been equitably tolled. *New York v. Hendrickson Bros., Inc.*, 840 F.2d at 1085. Accordingly, the disagreement expressed by the court in *Allan* with the dictum in *Hendrickson* regarding the self-concealing conspiracy theory does not undermine the consistency with which federal courts of appeals have applied the fraudulent concealment doctrine in antitrust cases.[2]

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[1] See also, *Pinney Dock and Transport Co. v. Penn Central Corp.*, 838 F.2d 1445, 1472 (6th Cir. 1988), *cert. pending on other grounds* (No. 88-72) (filed June 11, 1988); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 218-19 (4th Cir. 1987); *Hennegan v. Pacifico Creative Service, Inc.*, 787 F.2d 1229, 1302 (9th Cir.), *cert. denied*, 107 S.Ct. 279 (1986); *Berkson v. Del Monte Corp.*, 743 F.2d 53, 56 (1st Cir. 1984), *cert. denied*, 470 U.S. 1056 (1985); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1154 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1169 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980); *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570, 574 (4th Cir. 1976); *Kansas City, Mo. v. Federal Pac. Elec. Co.*, 310 F.2d 271, 278 (8th Cir.), *cert. denied*, 371 U.S. 912 (1962).

[2] It is also important to note that the court in *Hendrickson* relied exclusively on the Tenth Circuit's subsequently-vacated panel opin-

3. Petitioner also errs in suggesting that the result in *Allan* somehow demonstrates the "egregiousness" of the result in the case. (Pet. Sup. Br. 10). Contrary to this mischaracterization and for the reasons identified by the district court below, this "is a classic case in which the statute of limitations should be given effect." (Pet. App. 52). Moreover, in objecting to the result in this case on the basis of the result in *Allan*, petitioner is attempting to convert the district court's factual findings that none of the alleged acts were affirmative acts of concealment into legal arguments, none of which were raised in the petition for certiorari presently before this Court. Such factual findings, however characterized, are not worthy of this Court's review.

Respectfully submitted,

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ion in this case in formulating its dictum regarding the self-concealing conspiracy theory. The uncertainty over how the court in *Hendrickson* would have treated the self-concealing conspiracy theory in light of the Tenth Circuit's *en banc* vacating of the panel opinion further weakens the operative significance of the *Hendrickson* opinion in this appeal.